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No. 98-9349

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an officer's handling of the exterior of luggage sitting in an overhead baggage area of a passenger bus is a "search" of the luggage within the meaning of the Fourth Amendment.

2. Whether the bus on which petitioner was a passenger was unlawfully detained following inspection at an immigration checkpoint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 167 F.3d 225. The orders of the district court denying petitioner's motion to suppress and his motion for reconsideration (Pet. App. B and C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 57 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A.

1. On July 17, 1997, petitioner was a passenger on a Greyhound bus that was stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas, which is located on Interstate 10 approximately 85 miles east of El Paso, Texas. Pet. App. B1; Tr. 3-4, 11, 25.[1] Border Patrol Agent Cesar Cantu boarded the bus and checked the immigration status of the passengers as he worked his way toward the rear. Pet. App. B1; Tr. 2, 5. By the time Agent Cantu reached the back of the bus, he was satisfied that all of the passengers were lawfully in the United States. Pet. App. B1; Tr. 5-6.

Because the bus had no rear door, Agent Cantu walked back toward the front of the bus to the exit. Pet. App. C1; Tr. 5-6. As he did so, he checked the luggage racks above the heads of the seated passengers, touching and squeezing the luggage as he passed. Pet. App. B1, C1; Tr. 5-6, 38.[2] Petitioner was seated about five

[1] "Tr." designates the transcript of the September 18, 1997, hearing on petitioner's motion to dismiss.

[2] As the court of appeals noted, the record is unclear as to whether the overhead luggage bins on this particular bus were of the open or closed type. Pet. App. A226; see Tr. 7.

rows from the back of the bus. Pet. App. B2; Tr. 59-60. When Agent Cantu squeezed a soft-sided green canvas bag in the luggage bin above petitioner's seat, he noticed that the bag contained a hard "brick-like" object that he suspected was narcotics. Pet. App. A226, B2, C2; Tr. 8-10. Agent Cantu then asked the passengers who owned the bag, and petitioner acknowledged that the bag was his. Pet. App. A226, B2, C2; Tr. 11-12. After a short conversation, petitioner consented to a search of the contents of the bag. Ibid. See also Pet. App. B4. Inside the bag, Agent Cantu discovered a "brick" of methamphetamine weighing 1.34 pounds. Pet. App. A226, B2-B3, C2; Tr. 12-13, 18. After petitioner was advised of his Miranda rights, see Miranda v. Arizona, 384 U.S. 436 (1966), he told Agent Cantu that he was delivering the methamphetamine from California to Little Rock, Arkansas. Pet. App. A226, B3; Tr. 20-22. Later that same day, petitioner made a second confession to another law enforcement officer. Pet. App. B3; Tr. 47-49.

2. Petitioner was indicted for possessing methamphetamine with intent to distribute it and conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. The district court denied petitioner's pre-trial motion to suppress the fruits of the search of his luggage at the Sierra Blanca checkpoint. Pet. App. B. The district court found that, in the course of inspecting the bus passengers at the immigration checkpoint, as authorized by 8 U.S.C. 1357(a)(3), Agent Cantu was authorized to look in the

luggage compartments of the bus. Pet. App. B4.[3] The district court further found that no Fourth Amendment intrusion occurred when Agent Cantu "felt the outside of [petitioner's] softside green cloth bag." Pet. App. B4. "[I]t is well settled," the court explained, "that the minimally intrusive touching of the exterior of a bag located in the luggage area of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment." Pet. App. B4 (citing United States v. Lovell, 849 F.2d 910 (5th Cir. 1988), and United States v. Garcia, 849 F.2d 917 (5th Cir. 1988)). Finally, the district court found that petitioner had voluntarily consented to Agent Cantu's search of the interior of the bag, and that there was no ground for suppressing his post-arrest admissions. Pet. App. B5.[4]

Petitioner sought reconsideration, arguing that Agent Cantu, by feeling the luggage as he walked back to the front of the bus, unnecessarily prolonged the time the bus was stopped, converting the checkpoint stop into an unlawful detention. The district court found that the luggage inspection did not result in a protracted detention of the passengers under the facts here. It explained:

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[3] The district court later observed that "it would not have been impossible for an alien to conceal himself or herself in the luggage compartments." Pet. App. C2; see Tr. 81 (child could have been concealed); 11/24/97 Trial Tr. 4 (stipulation that "the overhead would have been large enough to accommodate a child").

[4] The district court did suppress evidence resulting from a separate search of the backpack of petitioner's traveling companion and co-defendant, Jason Wiggs. Pet. App. B5-B6. The district court found that Wiggs, unlike petitioner, had been arrested without probable cause before methamphetamine was found in Wiggs's luggage.

> When Agent Cantu reached the back of the bus, he looked in the bathroom, where some individual could have been hiding. He then turned around and headed for the front of the bus. As he did so, he looked in the luggage storage compartment located above the seats. As he came to [petitioner's] row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object. Thinking on the basis of his experience that this might be a package of drugs, he began asking questions of the nearby passengers. This led to the discovery of the fact that [petitioner] was the owner of the bag and was transporting controlled substances.

Pet. App. C2. After Agent Cantu completed questioning the passengers at the rear of the bus regarding their immigration status, the district court observed, Agent Cantu was not required "to jump out the back window or to race to the front of the bus and jump out the door." Ibid. The district court added that, while the luggage inspection "may" have delayed Agent Cantu's departure from the bus at most "by a few seconds or even one or two minutes," that "trivial and inconsequential" delay did not give rise to a Fourth Amendment violation. Pet. App. C2-C3.

3. Following a bench trial on stipulated facts, petitioner was convicted on both counts on which he was charged. The court of appeals affirmed. Pet. App. A225-A228.

a. The court of appeals first rejected petitioner's claim that Agent Cantu, in touching the exterior of petitioner's luggage, had conducted a "search" within the meaning of the Fourth Amendment. Relying on the principle that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection," Katz v. United States, 389 U.S. 347, 351 (1967), see Pet. App. A226-A227, the court of appeals concluded

that petitioner had knowingly exposed the exterior of his bag to touching and feeling by others. Petitioner had stored his bag in the overhead luggage bin in the common area of a Greyhound bus where, the court observed, it foreseeably would be squeezed, moved, and manipulated by others because "on common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage." Id. at A227. Having knowingly exposed his bag to such public touching, the court continued, petitioner "did not have a reasonable expectation that his bag would not be handled or manipulated" as it had been by Agent Cantu in this case. Ibid. (citing United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir.), cert. denied, 519 U.S. 906 (1996); United States v. Harvey, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992)).

The court of appeals also rejected petitioner's reliance on United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998). In that case, the Tenth Circuit had held that the law enforcement officer's manipulation of luggage stored in an overhead luggage bin constituted a search where the officer's manipulation was different from the sort of handling one might reasonably expect from a fellow passenger. See Pet. App. A227 (characterizing Nicholson). For Fourth Amendment purposes, the court of appeals held, it was irrelevant that Agent Cantu's manipulation of the exterior of petitioner's bag was calculated to detect contraband. Pet. App. A227 (citing California v. Ciraolo, 476 U.S. 207 (1986)).

b. The court of appeals also rejected petitioner's claim that Agent Cantu discovered the methamphetamine during an unlawful detention of the bus after the immigration inspection had been completed. Pet. App. A227-A228. The court of appeals noted that the bus had no rear exit and that Agent Cantu had inspected the luggage compartment while walking to the exit at the front of the bus. Id. at A227. Although the court of appeals recognized that the scope of the permissible inspection at a permanent immigration checkpoint is limited, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976), it "[did] not read Martinez-Fuerte to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door." Pet. App. A228. Pointing out that there was "no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes," the court concluded that "the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop." Pet. App. A228.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that Agent Cantu, by touching and manipulating the exterior of his bag while walking toward the exit of the bus, conducted an unlawful "search" within the meaning of the Fourth Amendment. The courts of appeals, he further contends, are in conflict on whether handling the exterior of luggage sitting in the overhead luggage compartment of a bus or train constitutes a "search" within the meaning of the Fourth

Amendment. While there is disagreement in the courts of appeals about whether an inspection of the general type conducted here constitutes a Fourth Amendment search, it is not clear that, on the particular facts of this case, any other circuit would have reached a different result. Because the court of appeals correctly held that the brief handling of petitioner's bag in this case was not a search, further review is not warranted.

a. Government action constitutes a "search" within the meaning of the Fourth Amendment only if it infringes on an expectation of privacy that society considers to be objectively reasonable. California v. Greenwood, 486 U.S. 35, 39 (1988); United States v. Jacobsen, 466 U.S. 109, 113 (1984); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Agent Cantu's examination of the exterior of petitioner's bag did not violate such an expectation. It is undisputed that petitioner left his bag exposed in the overhead luggage compartment common to all passengers on the Greyhound bus. And it likewise is undisputed that, "on common carriers" like the bus, "passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage." Pet. App. A227. As a result, it was entirely "foreseeable" if not expected that petitioner's "bag would be squeezed, moved, and manipulated by others." Ibid. Accordingly, petitioner "did not have a reasonable expectation that" such "handl[ing] or manipulat[ion] by others" would not occur. Ibid.; see Katz, 389 U.S. at 351 ("What one knowingly

exposes to the public * * * is not a subject of Fourth Amendment protection.").

Agent Cantu's handling of the exterior of the luggage was, moreover, minimally intrusive. Like the "canine sniff" of luggage that this Court held not to be a Fourth Amendment search in United States v. Place, 462 U.S. 696 (1983), the agent's touching of the bag did "not require opening the luggage." Place, 462 U.S. at 707. Nor did it "expose noncontraband items that otherwise would remain hidden from public view." Ibid. To the contrary, by its nature, such touching of the exterior of the bag -- like the similar touching and handling of bags that might be expected from other passengers or carrier employees -- reveals only the general shape and density of objects inside a bag. See United States v. McDonald, 100 F.3d 1320, 1326 n.7 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997).

For those reasons, officers may legitimately touch and handle the exterior of luggage placed in the overhead rack of a bus or train -- just as other passengers might while stowing, opening, or retrieving their own luggage -- without converting their observations into a "search" within the meaning of the Fourth Amendment. As the Seventh Circuit noted in United States v. McDonald, supra, a bus passenger does "not have a reasonable expectation of privacy that the exterior of" luggage placed in an overhead rack will "not be felt, handled, or manipulated by others." Id. at 1326. Any such expectation, that court explained, is inherently unreasonable given the likelihood that other

passengers, "in retrieving and stowing their own bags, * * * would have to move, touch, or push" the defendant's "bags, and would in all probability feel the outside of [the] bags in doing so." Ibid. Instead, a passenger who places his or her bags on an overhead rack "knowingly and voluntarily expose[s] the exterior of [the] bags to being physically touched by other persons." Ibid.

Similarly, in United States v. Guzman, 75 F.3d 1090, cert. denied, 519 U.S. 906 (1996), the Sixth Circuit found that it was not a search when an officer's "touch" of the exterior of a passenger's bag in the overhead luggage bin of a bus indicated the presence of "several hard bricks inside." Id. at 1095. While passengers have an expectation of privacy in the contents of their luggage, the Guzman court observed, that expectation does not extend to the exterior "feel" of luggage in overhead racks because such items are "accessible to others in the normal flow of traffic on the bus." Ibid.

b. Petitioner asserts that the holding below conflicts with the Tenth Circuit's decision in United States v. Nicholson, 144 F.3d 632 (1998). While there is tension between the holding in Nicholson and the holdings in McDonald, Guzman, and this case, the position of the Tenth Circuit on facts directly analogous to those in this case is unclear. Thus, although the question presented in this case may ultimately require resolution by this Court, such review is not warranted in this case.

The Tenth Circuit in Nicholson began by recognizing that an "officer's touching of a bag's exterior does not necessarily

constitute a search." Nicholson, 144 F.3d at 636 (noting uniform authority supporting that proposition). The Nicholson court further acknowledged that placing a bag in the overhead rack of a common carrier necessarily "exposes it to certain intrusions" because "[s]eeking to make room for their own articles, other passengers may push and move the bag." Id. at 639. "The degree of intrusion," the Tenth Circuit concluded, "is the determining factor as to whether an officer's contact with the exterior of luggage constitutes a search under the Fourth Amendment." Ibid.

In Nicholson itself, the Tenth Circuit held that the officer's handling of the bag did constitute a "search" under the Fourth Amendment because the officer had manipulated the bag in a particularly intrusive manner -- one that the defendant "did not reasonably expect from other passengers." 144 F.3d at 639. Specifically, the law enforcement officers there, with the permission of the bus company, entered the passenger area of a Greyhound bus, after the passengers had disembarked at a regularly scheduled stop en route from San Diego to New York City, and proceeded to remove the passengers' bags from the overhead racks so that they could be "manipulated and smelled." Id. at 634-635. Distinguishing its earlier decision in United States v. Gault, 92 F.3d 990 (10th Cir.), cert. denied, 519 U.S. 939 (1996) -- which held that an officer did not perform a "search" when he kicked and lifted a gym bag that had been on the floor of the train, protruding into the aisle -- the court of appeals in Nicholson observed that "the officer's manner of handling the bag" in Gault

"was the sort that a traveler leaving the bag in such a position reasonably might expect." Nicholson, 144 F.3d at 636-637 (explaining Gault). The same thing, the Tenth Circuit held in Nicholson, could not be said of what the court thought to be the more intrusive handling of bags in that case. Id. at 639.[5]

The ultimate reach of the Tenth Circuit's holding is unclear. The court of appeals did state that it "part[ed] company with the Seventh Circuit's conclusion in McDonald that a passenger on a commercial bus has no reasonable expectation that a carry-on bag in an overhead rack will not be 'manipulated by others.'" Nicholson, 144 F.3d at 639 (quoting McDonald, 100 F.3d at 1326). Similarly, in explaining why the intrusion before it constituted a "search," the court in Nicholson focused on the fact that the agent had "worked [Nicholson's] bag to determine whether it contained something of independent evidentiary value," and the court

[5] The Eighth Circuit, while it has considered Fourth Amendment challenges to similar luggage inspections, has not resolved the specific question presented here. In upholding an officer's removal of a bag from the overhead baggage compartment to the floor of a bus for a canine "sniff" of the luggage, the Eighth Circuit has stated that "[p]assengers have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment." United States v. Harvey, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992). A more recent decision, however, indicates that the issue is not settled in that Circuit if the officer, instead of moving the bag to the floor, feels the exterior of the bag. In United States v. Washington, 146 F.3d 536 (8th Cir. 1998), an officer noticed the defendant's bag in the overhead luggage compartment of a bus and felt bundles consistent with narcotics packaging when he "physically manipulated it, lifted it, and felt along its bottom." Id. at 537. The Eighth Circuit in Washington stated that it had "grave doubts" about the constitutional propriety of the officer's manipulation of the defendant's bag, but it did not find it necessary to resolve that question because the defendant in that case was found to have abandoned the bag. Id. at 537-538.

concluded that "manipulating a bag with the hands" is a search because it may reveal the contents of the interior of the bag and is "aimed at" doing so. Ibid. (internal quotation marks omitted). Both the Seventh Circuit in McDonald and the court of appeals in this case correctly rejected that reasoning, concluding instead that such manipulation of stowed luggage in the overhead compartment of a bus does not constitute a Fourth Amendment "search" so long as the officers' actions are objectively consistent with what a traveler might reasonably expect to occur as other passengers push and move bags to facilitate stowage or retrieval of their own. McDonald, 100 F.3d at 1326 ("[T]he feeling and pressing of McDonald's bags that the police officers undertook in the present case was nothing more than McDonald might expect from others, bus employees as well as passengers on the bus, moving luggage to adjust, remove, or make room for their baggage."); Pet App. A227 (noting that "[o]n common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage," and disagreeing with the analysis of Nicholson because the officers' intention in manipulating the bag "is irrelevant for Fourth Amendment purposes").

The result in Nicholson may nevertheless turn on a factual distinction. In Nicholson, the court of appeals concluded that the agent "departed from the type of handling a commercial bus passenger would expect his baggage to be subjected [to]," where the agent "removed [Nicholson's] carry-on bag from the overhead rack

and conducted a 'tactile examination * * * .'" 144 F.3d at 639. The Nicholson court further noted that, in contrast to the facts before it, the baggage in McDonald was examined "without actually removing the bags from the racks." Id. at 635, 638. See also Pet. App. A226 (petitioner's baggage was squeezed while it remained in the overhead rack). And the Nicholson court added that "[n]otably, in McDonald, the [Seventh Circuit] thrice repeated that the officer did not remove defendant's bag from the overhead rack during his initial contact with it." Nicholson, 144 F.3d at 638 (citing McDonald, 100 F.3d at 1322, 1323 n.3, and 1326).

It is not obvious, as an analytical manner, why the removal of the bag before its manipulation should make a difference in the outcome. Passengers or bus operators may often have to remove stowed baggage in order to rearrange bags or to fit additional bags into a storage compartment. See United States v. Harvey, 961 F.3d at 1364. Moreover, the Tenth Circuit in Nicholson did not suggest that the agent's decision to remove the bag from the overhead rack rendered the manipulation in that case more thorough or intrusive than it otherwise would have been. At the same time, however, it remains to be seen whether the Tenth Circuit will conclude that a brief tactile inspection of baggage that remains in an overhead rack -- as in this case -- constitutes a "search." The uncertainty over whether the Tenth Circuit will apply Nicholson to those facts is reinforced by that court's observation that "[t]he degree of intrusion is the determining factor as to whether an officer's

contact with the exterior of luggage constitutes a search under the Fourth Amendment." 144 F.3d at 639.

Accordingly, although we disagree with the ultimate result in Nicholson, at present there does not appear to be a disagreement concerning the principles applicable to cases like this one; nor is there a square conflict in results. To the contrary, the courts of appeals generally agree that a law enforcement officer's manipulation of the exterior of luggage placed in common stowage areas or checked with a common carrier is permissible under the Fourth Amendment unless the manipulation is of a sort that society expects not to occur; i.e., wholly inconsistent with the way another passenger or the carrier's employees might handle the bag. See, e.g., United States v. Lovell, 849 F.2d 910, 913 (5th Cir. 1988). And while the application of that broad principle to various methods of examination may yield different results in different contexts, those applications have not as yet yielded a square conflict requiring this Court's review.

2. Petitioner also contends that the inspection of his bag occurred during an unlawful detention of the bus and its passengers. Pet. 11-13. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), this Court upheld brief vehicle stops by the Border Patrol at fixed checkpoints at which officers may question the occupants about their immigration status and request the production of a document evidencing a right to be in the United States. Id. at 558, 566-567. The Court cautioned, however, that "any further detention * * * must be based on consent or probable

cause." Id. at 567 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975)).

Relying on that language, petitioner argues that the bus was unlawfully detained for additional time because Agent Cantu, as he walked to the exit at the front of the bus, paused to touch petitioner's bag, even though he had already concluded that all the passengers on the bus were lawfully in the United States. Pet. 11-13. That fact-specific claim was properly rejected by both courts below. See Pet. App. A227-A228, C2-C3. Agent Cantu's inspection of the luggage occurred as he walked toward the exit at the front of the bus -- there was no rear exit -- after having checked the immigration status of the passengers. Pet. App. A227; Pet. App. C2. There was no evidence that Agent Cantu's touching of the bags as he walked through the bus caused a delay of any consequence. Id. at A228.[6] Nor is it reasonable to read Martinez-Fuerte as prohibiting an officer from proceeding toward the exit at the front of the bus at a reasonable pace. As the courts below observed, Martinez-Fuerte surely does not require agents like Agent Cantu "to jump out a window or sprint back to the front of the bus and jump out the door" the moment they conclude that the bus's occupants are in the United States legally. Pet App. A228; see id. at C2 (similar statement).[7]

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[6] That conclusion is further supported by the fact that petitioner was seated very near the rear of the bus, so any delay prior to reaching petitioner's bag would have been minimal. See Tr. 80.

[7] Although petitioner argues that the detention in this case "was not brief," Pet. 13, he does not cite anything in the record to undermine the district court's contrary conclusion that any delay lasted only "a few seconds" or "one or two minutes." See Pet. App. C2; see also Pet. App. A228 (court of appeals' holding that there was no evidence that luggage inspection delayed the bus' departure more than one or two minutes). That factual determination, concurred in by both courts below, does not warrant review by this Court. Petitioner also suggests (Pet. 13) that, as part of his inspection, Agent Cantu manipulated luggage under passengers' seats and had passengers move so that he could reach luggage under the seats. That assertion is apparently based on testimony that the district court did not adopt (or explicitly reject). Instead, the district court found that that "[o]n his way back to the front of the bus, Agent Cantu checked the luggage racks above the heads of the seated passengers." Pet. App. B1-B2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

BOND, STEVEN DEWAYNE Petitioner	)	
vs.	)	No. 98-9349
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 3rd day of September 1999.

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